Supreme Court, U.S.
FILED
JAN 2 6 2004
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No. 03-768

In The
Supreme Court of the United States

HSIEN I. PENG,

Petitioner,

v.

MEI CHIN PENG HU; JONATHAN HU,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT TO QUESTION PRESENTED

In order to establish a right to recover under 42 U.S.C. §1983 against private defendants, does a Plaintiff need to prove a conspiracy between state official(s) and the private defendants? Does the mere making of the report to the police by a private person constitute a "state action" for purposes of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Petitioner Hsien I. Peng filed his civil rights action under the Civil Rights Act, 42 U.S.C. §1983 against Los Angeles County Deputy Sheriff Scott Gage who is no longer in this proceeding, as well as his sister, Respondent Mei Chin Peng Hu, and his nephew, Respondent Jonathan Hu, alleging their violations of Peng's Fourth Amendment rights.

The District Court granted Deputy Sheriff's Summary Judgment Motion on the ground that under the totality of the circumstances, Deputy Gage's belief that probable cause existed to arrest Peng for robbery was objectively reasonable. The District Court reasoned that Deputy Gage did not rely solely on conclusory allegations made by M. Hu, the alleged victim of the robbery. Rather, M. Hu's allegations were specific, based on personal knowledge, and could support a reasonable police officer's conclusion that Peng used the threat of force to obtain the title documents from her. The District Court also held that whether Hus had asked Deputy Gage to arrest Peng is immaterial to the existence of probable cause. (Petition App. C at 42a)

Having granted the Deputy's Summary Judgment Motion, the District Court issued an Order to Show Cause for Plaintiff-Appellant to show the reason why the action under Section 1983 may proceed against the two remaining private/individual defendants. After its review of the parties' written responses to Court's Order to Show Cause, the District Court ordered that the case as against the individual defendants be dismissed on the ground that the individual defendants were not state actors for purposes of 42 U.S.C. §1983 because there was no concerted action

between them and Deputy Gage to have Petitioner arrested and, in the alternative, the individual defendants, M. Hu and J. Hu, did not have such control over Deputy Gage's conduct to be said to have proximately caused the alleged constitutional tort. (Petition App. C at 26a-30a).

Petitioner filed an appeal to the Ninth Circuit to the District Court's Order for Summary Judgment, dismissing Petitioner's claim against Deputy Sheriff Gage and the District Court's Order re: Subject Matter Jurisdiction dismissing Petitioner's claim against his sister and nephew.

The Ninth Circuit affirmed both orders of the District Court, holding that Deputy Gage had probable cause to arrest petitioner, and even if he did not have probable cause, Gage was entitled to qualified immunity; and that even though there were disputed facts as to whether Mei Hu and Jonathan Hu had lied to Gage in causing his arrest, there was no evidence that Gage knew that petitioner was innocent of robbery to determine concerted action to make Mei Hu and Jonathan Hu state actors for purposes of §1983.

The Ninth Circuit relied on this Court's decision in *Soldal v. Cook County*, 506 U.S. 56, 60 n.6, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) which noted that "if the police condone activities by private parties that they know to be illegal, there exists sufficient evidence of conspiracy between the private parties and the officer to foreclose summary judgment." Lacking evidence of police's knowledge of Peng's alleged innocence, the Ninth Circuit, therefore, found no conspiracy between Deputy Gage and the two private parties. The Ninth Circuit further held that a single request to the police, without more, was not sufficient to

establish a claim against a private actor pursuant to §1983. (Petition App. B at 17a, 19a and 21a-22a).

Petitioner requested a rehearing and a rehearing en banc after the Ninth Circuit issued its opinion. The request for rehearing was denied, and Petitioner subsequently filed this Petition for Writ of Certiorari.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE NINTH CIRCUIT WAS CORRECT AND CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

A. THE NINTH CIRCUIT WAS CORRECT IN FINDING NO CONCERTED ACTION BETWEEN THE STATE OFFICIAL, DEPUTY GAGE, AND THE TWO PRIVATE PARTIES, MEI HU AND JONATHAN HU.

This Court has consistently held that the involvement of a state official in a conspiracy between state officials and private persons would provide the state action needed to show a direct violation of a victim's Fourteenth Amendment rights entitling her to relief under §1983 and that private persons involved in such a conspiracy are acting "under color" of law and can be liable under §1983. (*Adickes v. Kress & Co.*, 198 U.S. 144 (1970); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *United States v. Price*, 383 U.S. 787 (1966); *Dennis v. Sparks*, 449 U.S. 24 (1980))

This Court in *Adickes v. Kress & Co.*, 198 U.S. 144 (1970) held that the involvement of a state official in a conspiracy plainly provides the state action essential to

show a direct violation of the victim's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful and that a private party involved in such a conspiracy, even though not an official of the State, can be liable under 1983. This Court further held that "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," (citing *United States v. Price*, 383 U.S. 787, 794 (1966).) Id., 398 U.S. at 153. This Court had placed the emphasis on the issue whether the private person and the policeman somehow reached an understanding to deny Miss Adickes service or to cause her subsequent arrest.

In *United States v. Price*, 383 U.S. 787 (1966), this court held that private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute [§1983]. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. This Court noted that in *Price* the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that

participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law. Id., 383 U.S. 787 at 795-796.

Hence, this Court has clearly set forth the rule that private persons must have been participants in official lawlessness and must have acted in willful concert with state officers to be held liable under §1983. And, the Ninth Circuit was correct in requiring a private party to be a willful participant in joint action with the State or its agents. (Petition App. B, at 21a.)

B. BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT HAVE FOUND THAT THE STATE OFFICIAL, DEPUTY GAGE, HAD PROBABLE CAUSE TO ARREST PETITIONER OR IN THE ALTERNATIVE, HAD QUALIFIED IMMUNITY WHEN CONDUCTING THE ARREST. THEREFORE, THERE WAS NO "STATE ACTION" FOR PURPOSES OF FOURTEENTH AMENDMENT VIOLATION ON PART OF DEPUTY GAGE, AND THERE COULD NOT BE ANY CONSPIRACY BETWEEN RESPONDENTS, THE PRIVATE PARTIES, AND THE DEPUTY SHERIFF WHO DID NOTHING WRONG TO CONDUCT THE ARREST.

In *Dennis v. Sparks*, 449 U.S. 24 (1980), where it was alleged a Texas state court's judge had conspired with private parties to illegally issue an injunction which was subsequently dissolved by the appellate court, this Court held that the judge's immunity from damages liability for an official act that was allegedly the product of a corrupt

conspiracy involving bribery of the judge does not change the character of his action or that of his co-conspirators. Therefore, the action against the private parties accused of conspiring with the judge is not subject to dismissal. Id., 449 U.S. 24, 25.

This case is easily distinguished from the *Dennis* case in that the state official, Deputy Gage, was held by both the District Court and the Ninth Circuit not to have violated Petitioner's constitutionally protected rights and that both courts have ruled that there was no concerted action between Deputy Gage and the private parties, Mei Hu and Jonathan Hu. In fact, the District Court had found that Deputy Gage did not rely solely on conclusory allegations made by M. Hu, the alleged victim of the robbery. Rather, M. Hu's allegations were specific, based on personal knowledge, and could support a reasonable police officer's conclusion that Peng used the threat of force to obtain the title documents from her. The District Court also held that whether Hus had asked Deputy Gage to arrest Peng is immaterial to the existence of probable cause. (Petition App. C at 42a) In *Dennis*, this Court did not resolve the issue whether there actually existed any conspiracy between the judge and the private parties. This Court was called upon to decide the issue whether a 1983 action against the private parties can be maintained after the alleged co-conspirator judge had claimed immunity and was dismissed out of the case. This Court provided a positive answer to the question.

In this case, Petitioner has limited his Petition for Review to the Ninth Circuit's decision affirming the District Court's order to dismiss the private persons on the subject matter ground and framed his issue in the fashion showing that Petition admitted that there was no

conspiracy between the arresting officer and the private parties and that Petitioner is asking this Court to determine whether private parties by providing false statements to State Officials to cause the State Officials' independent arrest of Petitioner can be held liable under 42 U.S.C. §1983. Since there existed no conspiracy between Deputy Gage and Respondents, Mei Hu and Jonathan Hu, following the well-established rules by this Court, the private persons cannot be held to have acted "under color" of law and cannot be liable under §1983.

II. THIS COURT IN *LUGAR v. EDMONDSON OIL CO.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) HAS CLEARLY SET FORTH THE RULE FOR THE RELATIONSHIP BETWEEN §1983 REQUIREMENT OF "ACTION UNDER COLOR OF STATE LAW" AND THE FOURTEENTH AMENDMENT REQUIREMENT OF "STATE ACTION."

In *Lugar*, the Respondent creditors filed suit in Virginia state court on a debt owed by Petitioner, and sought prejudgment attachment of certain of Petitioner's property. Pursuant to Virginia law, respondents alleged, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors; acting upon that petition, a Clerk of the state court issued a writ of attachment, which was executed by the County Sheriff; a hearing on the propriety of the attachment was later conducted; and 34 days after the levy the trial judge dismissed the attachment for respondents' failure to establish the alleged statutory grounds for attachment. Petitioner then brought this action in Federal District Court under 1983, alleging that in attaching his

property respondents had acted jointly with the State to deprive him of his property without due process of law.

The District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment, and that the complaint therefore did not state a valid claim under 1983. The Court of Appeals affirmed, but on the basis that the complaint failed to allege conduct under color of state law for purposes of 1983 because there was neither usurpation or corruption of official power by a private litigant nor a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer was compromised to a significant degree. Id., 457 U.S. at 922.

A. THE "STATE-ACTION" AND THE "UNDER-COLOR-OF-STATE-LAW" ARE IDENTICAL IF THE 1983 ACTION IS BROUGHT AGAINST A STATE OFFICIAL. AS TO A 1983 ACTION AGAINST A PRIVATE PERSON, IF THE CHALLENGED CONDUCT OF PRIVATE PERSON CONSTITUTES STATE ACTION AS DELIMITED BY THIS COURT'S PRIOR DECISION, THEN THE CONDUCT OF THE PRIVATE PERSON WAS ALSO ACTION UNDER COLOR OF STATE LAW.

This Court noted that the "state-action" and the "under-color-of-state-law" requirements are obviously related and that in a 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. Id., 457 U.S. at 929. As to a 1983 action against a private person, this Court held that private use of the challenged state procedures

with the help of state officials constitutes state action for purposes of the Fourteenth Amendment. This Court also held that if the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, §1983, designed to provide judicial redress for just such constitutional violations. This Court further noted that to read the "under color of any statute" language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the 1983 cause of action would be wholly inconsistent with the purpose of the Civil Rights Act of 1871, 17 Stat. 13, from which 1983 is derived. Id., 457 U.S. at 935. This Court, therefore, summarized the rule as follows: If the challenged conduct of respondents constitutes state action as delimited by the Court's prior decisions, then that conduct was also action under color of state law and will support a suit under 1983.

As to what constitutes state action, this Court emphasized that careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. The conduct allegedly causing the deprivation of a federal right, according to this Court, must be fairly attributable to the State. There is a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a

person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them. Id., 457 U.S. 938.

This Court clarify the issues of *Lugar* by stating that the first question of the case is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors." Id., 457 U.S. at 940. This Court stated that the resolution of the issue whether *Lugar*'s ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him is essential to the proper disposition of the case. This Court determined that Petitioner actually were challenging the state statute as procedurally defective under the Fourteenth Amendment and held that while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well.

B. WHETHER THE CHALLENGED CONDUCT OF A PRIVATE PERSON CONSTITUTES A STATE ACTION IS DETERMINED BY PRIVATE PARTIES' JOINT PARTICIPATION WITH STATE OFFICIALS IN THE DEPRIVATION OF RIGHTS OF THE VICTIM.

To determine whether the second element of the state-action requirement is met, this Court went on to recite the well-established rules by this Court as follows:

> "We have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes v. S. H. Kress & Co., supra*, at 152, in the context of an equal protection deprivation"
>
> "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" quoting *United States v. Price*, 383 U.S., at 794." Id., 457 U.S. 922 at 942.

In sum, a private person may be held liable under §1983 for his use of a procedurally defective State statute to deprive another person's Fourteenth Amendment rights, if the private person jointly participated with the state officials in the deprivation of the other's constitutionally protected rights.

This Court in *Lugar*, therefore, has clearly set forth the rule for the relationship between §1983 requirement of

"Action under Color of State Law" and the Fourteenth Amendment Requirement of "State Action" both in the context of a 1983 action against a state official and a 1983 action against a private person. There is no need for this Court to readdress the same issue.

Moreover, the instant case can be distinguished from *Lugar* in the following aspects: (1) In *Lugar*, the State statute invoked by the respondent creditors was procedurally defective and hence unconstitutional, whereas in the instant case Petitioner never challenged any California statute relied upon by the Deputy Gage to effectuate the arrest of Petitioner; (2) In *Lugar*, the state action was found in the enactment of the unconstitutional statute, in the instant case there was no illegal state action due to the fact that the District Court and the Ninth Circuit both ruled that Deputy Gage had probable cause to arrest Petitioner; (3) In *Lugar*, respondent did not misuse the state statute which was challenged as unconstitutional, whereas in the instant case Petitioner readdressed the issue in his Petition for Writ of Certiorari as whether by making the false statement to the arresting officer, Respondents Mei Hu and Jonathan Hu may be held liable under 42 U.S.C. §1983. This Court in *Lugar* has answered this particular question negatively when this Court held that private misuse of a state statute does not describe conduct that can be attributed to the State.

III. CONCLUSION

This Court in numerous prior decisions has already addressed the issue concerning when a private person can be deemed as a state actor and be held liable under 42 U.S.C. §1983. The Court also has adequately addressed

the issue concerning the relationship between the 1983 requirement of "action under color of state law" and the Fourteenth Amendment requirement of "state action" in the *Lugar* case. The Ninth Circuit did not err in characterizing this Court's prior case law in the instant case. There is, therefore, no need to readdress the issue. The Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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